

MEMORANDUM OF LAW

DATE: June 22, 1993

TO: Mary Rea, Assistant Director, Risk Management
Department

FROM: City Attorney

SUBJECT: Long Term Disability Eligibility Date

You have requested a legal opinion regarding the proper eligibility date for the Long Term Disability ("LTD") benefits of a City employee. The employee has applied for LTD benefits two times and has stated the second claim represents a distinct and separate disability from the previous claim. Based upon this assertion, the employee has indicated that the LTD benefits should be computed at the salary level the employee had reached at the time the second claim was filed. You have asked if this is the correct date to use for ascertaining the level of benefits due the employee.

A brief history of the basis for the employee's LTD claims is necessary to respond to your question. On May 7, 1991, a medical report concerning the employee was issued by her doctor. The report indicates that the employee was admitted to the hospital on March 31, 1991. The admission diagnosis was listed as "ovarian mass-renal failure." The narrative portion of the doctor's report of the employee's medical history indicates the employee was suffering from end stage renal failure. It goes on to say that the condition had existed for some time previously, but that during the summer of 1990, the employee's renal failure condition improved to the extent that the employee was released from her ongoing dialysis treatment. The employee's subsequent admittance to the hospital on March 31, 1991, was caused by an impending ovarian tumor which exacerbated the pre-existing renal failure condition. It is clear from the doctor's report that the end stage renal failure was an ongoing condition at the time the employee developed the ovarian tumor and that the problems with the renal failure increased with the growth of the tumor.

The employee was released from the hospital after treatment for both conditions on April 17, 1991. Out patient dialysis schedules were arranged with the Urology Department and the

employee was placed on a renal diet. Again, the reports made clear that end stage renal failure was considered a primary illness when the employee was admitted to the hospital.

Subsequent to the employee's release from the hospital, the employee returned to full duty with the City on April 11, 1992. The employee returned to LTD status on September 4, 1992, pursuant to the attending physician's report indicating the employee was totally disabled from working and citing "chronic renal failure" as the disabling condition.

The employee indicated on the original LTD application that the disabling condition was an ovarian tumor only, despite the doctor's indication that both the tumor and renal failure were factors in the admission. The employee did indicate that she had previously suffered from renal failure, but did not list it as a currently active condition. Nevertheless, the attending physician's report indicates the end stage renal failure was an active condition at the time of employee's admission to the hospital and that a significant portion of the course of treatment during the employee's hospitalization focused on the treatment of the renal failure condition. The recurrence of the renal failure on September 4, 1992, cannot, therefore, be considered a separate and distinct illness from the ovarian tumor indicated in the employee's first LTD claim.

The LTD plan document, at sections 402(A)(5) and (6) provides:

- (5) If the Participant suffers a disability, meets the requirements of the Elimination Period, receives Long-Term Disability Benefits and/or is eligible for Long-Term Disability Benefits offset by Industrial Leave, and returns to work and suffers a recurrence of the disability within six (6) months of the date of return to work, then the Elimination Period shall be waived. The Elimination Period waiver applies to recurrence only, not to a new or different disability.
- (6) When the disabled employee returns to work and later becomes disabled due to the same cause within one year of date of disability, the Elimination Period is waived.

The City's LTD policy regarding recurring or cumulative injuries comports with state law covering the same or similar issues. Citing the legislative committee comment of Labor Code section 3208.1, the California courts have said that "'cumulative injury' consists of repetitive traumatic activities extending over a period of time, the combined effect of which causes any disability or need for treatment, and declares that the date of a cumulative injury is the date when any disability is caused thereby." *Chavez v. Workmen's Comp. Appeals Bd.*, 31 Cal. App. 3d 5, 7 (1973). Similarly, California Labor Code section 5412, which deals with cumulative injuries in the occupational sector provides in pertinent part: "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom" Based upon the applicable statutory authority and the courts interpretation of cumulative injury, the date of disability in the employee's case is the earlier date of March 31, 1991.

Following the provisions of the plan document, the employee's LTD benefits were resumed on September 4, 1992. The thirty (30) day Eligibility Elimination Period was waived pursuant to section 4.02(A)(6). Benefits were assessed at the pay scale of the original date of disability. This procedure comports with both the plan document and statutory and case law. The employee's LTD benefits should, therefore, continue at the current rate.

If you have further questions, please contact me.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

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